

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

Price Cap Performance Review)
for Local Exchange Carriers)

CC Docket No. 94-1

Treatment of Operator Services)
Under Price Cap Regulation)

CC Docket No. 93-124

Revisions to Price Cap Rules for AT&T)

CC Docket No. 93-197

COMMENTS OF COX ENTERPRISES, INC.

Cox Enterprises, Inc. ("Cox"), by its attorneys, hereby submits its comments on the Commission's Second Further Notice in the above captioned rulemaking proceeding.^{1/}

Cox is not a newcomer to telephony competition issues. In the early 1980s Cox was the first company to use cable television plant for the origination, distribution and termination of interstate, interexchange telecommunications, fighting through a state legal morass and prosecuting a Petition for Declaratory Ruling with the Commission to preempt state regulations that blocked interstate competition.^{2/} Cox staked out an early policy position that personal communications service ("PCS"), if properly encouraged, could provide wireless competition to

^{1/} See Price Cap Performance Review for Local Exchange Carriers, Treatment of Operator Services Under Price Cap Regulation, Revisions to Price Cap Rules for AT&T, Second Further Notice of Proposed Rulemaking in CC Docket No. 94-1, Further Notice of Proposed Rulemaking in CC Docket No. 93-124, and Second Further Notice of Proposed Rulemaking in CC Docket No. 93-197 (released September 20, 1995) ("Second Further Notice").

^{2/} See, e.g., Cox Cable Communications, Inc., Commline, Inc. and Cox DTS, Inc., Petition for Declaratory Ruling, 102 FCC 2d 110 (1985), vacated as moot, 1 FCC Rcd 561 (1986).

the LEC monopoly local loop.^{3/} It was the first cable operator to recognize the synergies between cable and competitive access provider ("CAP") networks by its acquisition of a controlling interest in Teleport. Through its wholly-owned subsidiary, Cox Communications, Inc., and through its interest in the Sprint Telecommunications Venture,^{4/} Cox was a bidder and ultimately a license winner in the A/B Block PCS auction.^{5/} Because of its many telephony business interests, Cox supports movement toward competition in local exchange markets. That competition has not, however, yet developed. Until it does and has taken root, Cox urges the Commission to follow the same prudent route towards local exchange carrier ("LEC") deregulation it has followed in deregulating other service areas. Deregulating in haste will harm -- not help -- competition, and will achieve nothing more than to entrench current LEC monopolists.

^{3/} Based on its development work, Cox received a pioneer's preference PCS license for the Los Angeles - San Diego major trading area ("MTA") for its successful experiments that used cable distribution plant as the backbone for a PCS network. See Amendment of the Commission's Rules to Establish New Personal Communications Services, Third Report and Order, 9 FCC Rcd 1337 (1994).

^{4/} The Sprint Telecommunications Venture ("STV") was the high bidder on 30 PCS licenses through its affiliates WirelessCo, L.P. and PhillieCo, L.P. The Sprint Telecommunications Venture is a partnership among subsidiaries of Cox, Sprint Corporation, Tele-Communications, Inc. and Comcast Corporation that was formed to provide wireless and wireline telecommunications services in markets throughout the United States.

^{5/} Cox Communications, Inc. won the B Block license for the Omaha MTA.

I. COMMISSION PRECEDENT SUPPORTS DEREGULATION ONLY AFTER DIMINISHED MARKET POWER CANNOT BE USED IN AN ANTI-COMPETITIVE MANNER.

In the Second Further Notice the Commission proposes to deregulate some aspects of the LEC price cap regime "even where competition has not yet arrived."^{6/} Such a proposal can only hurt consumers and potential competitors. It also is wholly inconsistent with the Commission's historically measured responses to deregulation requests from entities with market power. For example, in the long distance market, the only segment of the domestic telephony market where competition has made measurable inroads, AT&T was subject to price cap regulation for basic long distance services until very recently.^{7/} Only when AT&T demonstrated that its market share had dropped to 60 percent, and only after a twelve year history where AT&T did not control bottleneck facilities, did the Commission deregulate AT&T's interstate services. The actual presence of significant, sustainable competition was a factual predicate to deregulation of the long distance industry.^{8/}

In contrast, in the local exchange market, incumbent LECs have virtually a 100 percent market share and control bottleneck facilities essential to competitors. Any deregulation of an industry with such obvious market power is inconsistent with the Commission's reasoned

^{6/} Second Further Notice at 5.

^{7/} See Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, Order, FCC 95-427 (released October 23, 1995).

^{8/} As AT&T noted and the Commission concurred, AT&T's largest facilities-based competitors, MCI and Sprint, have billions of dollars in revenue and enough readily available nationwide fiber network capacity to constrain AT&T's market behavior, thus making "monopoly" pricing by AT&T unprofitable. Id. at 12-13.

deregulation of long distance telecommunications. Until the LECs face actual facilities-based⁹ competition in some measurable degree beyond a de minimis amount, the LECs will continue to have the bottleneck power, resources and incentive to prevent the development of sustainable competition in their local exchange service areas.^{10/}

As the Commission's own studies show, Tier 1 LECs alone still control 97 percent of access revenues -- a level not meaningfully different from the Bell System's share of toll revenues in 1981.^{11/} Consequently, references in the Second Further Notice to increased competition and "signs of changing market structure"^{12/} are premature, misplaced and utterly unsupported by any evidence in the record. Despite more than 10 years of effort, competitive access providers and other potential local loop competitors still have revenues that represent mere rounding errors for the Tier 1 LECs. Premature increases in LEC pricing flexibility, as proposed by the Second Further Notice, can only help to perpetuate the LEC monopoly -- an outcome that the public interest would decry -- because it would give LECs the ability to drive all competitors from the market permanently.

9/ Actual facilities-based competition will be realized when at least one LEC-competitor can provide switched services throughout a LATA market area and when that competitor is actually providing service to more than a de minimis share of the market.

10/ As one example of extreme LEC attempts to prevent local exchange competition, Southwestern Bell reportedly had 68 lobbyists working to defeat recent local competition legislation in Missouri. See Why SW Bell has the Midas touch; Southwestern Bell and Telephone Co. retains monopoly, MultiChannel News, October 9, 1995, at 1.

11/ See Common Carrier Competition; Spring 1995 at 5 (Industry Analysis Division, released May 31, 1995); attached to FCC Releases Common Carrier Competition Report, News Release, Rep. No. CC 95-31 (released May 31, 1995).

12/ Second Further Notice at 5.

II. CURRENT PRICE CAP REGULATION DOES NOT NEED TO BE RELAXED.

The current price cap regime, while far from perfect, at least provides some degree of stability. Stability is absolutely vital if a company is contemplating investing the huge amounts of capital and resources necessary to compete successfully with the LECs. If, however, as the Second Further Notice proposes, LECs are permitted to introduce new services subject to streamlined review or under alternative pricing plans, these freedoms will be manipulated by the LECs to undercut their competitors whenever competitors attempt to introduce new services. Consumers will not benefit from this type of LEC predatory behavior because competitors will find they have neither the time nor the resources to survive such anticompetitive LEC conduct.

Most disturbingly, if the price cap lower service band is removed as proposed, the LECs will be in an enviable position of being able to price their competitors out of business. The burden on a competitor to prove that the LEC price is below cost is a practical impossibility because of LEC ability to control and manipulate cost and pricing data. LECs have the resources, the staying power and the incentive to price squeeze if not predatorily price in "competitive" markets, and the LECs have every ability to do so if price cap lower service bands are removed. Once the LECs successfully drive competitors from the marketplace, moreover, maintenance of the upper service band limit will not be an effective restraint on LEC price increases because the LECs will face no opposition when they request price increases above the upper band.

Finally, retention of the current price cap regime will not encourage inefficient investment in infrastructure, as the Commission apparently fears.^{13/} Just as the Commission rejected AT&T's "cream skimming" and network inefficiency arguments in the late 1960s when it granted MCI authority to provide private microwave communications,^{14/} the Commission similarly must reject current LEC attempts to portray all competitor infrastructure investment as duplicative or "inefficient" and, therefore, inconsistent with the public interest.^{15/} Communities have never benefited from regulatory barriers that deter the construction of a second local grocery or clothing store because of claims that investment in a second store would be wasteful and "inefficient." Rather, communities benefit from the entry of new businesses, and regulatory authorities often provide new businesses with incentives and tax breaks, because they recognize that it is actual not theoretical competition that provides consumers with better service at lower prices. In telephony, a single monopoly provider system is the system that is now "inefficient" because competition in the local loop is technologically and practically available. Consequently, there are no valid public policy reasons to discourage facilities-based telecommunications infrastructure investment.^{16/}

^{13/} Id. at 15.

^{14/} See MCI Communications, Inc., Decision, 18 FCC 2d 953 (1969), recon., 21 FCC 2d 190 (1970).

^{15/} Another reason to reject these sorts of LEC arguments is that potentially competitive facilities-based networks already exist. Cable television fiber, for example, is already in place, and technology now makes it possible to use cable television system excess capacity to provide telephony services. Other facilities-based telephony providers, such as PCS providers, are building networks right now. Alternative facilities-based networks are already here and the Commission should support their use to their full capacity.

^{16/} If the LECs truly believe that rates for particular services are low enough to
(continued...)

The irony is that changes such as the elimination of sharing, the size of the productivity factor itself and the annual productivity factor election are needed to the Commission's price cap rules. These and other changes are necessary to tighten the price cap rules so that the rules can actually prevent cross-subsidy as they are intended. Any proposal to loosen the price cap rules, such as those in the Second Further Notice, will harm competition and the public interest. The proposals in the Second Further Notice should be put on hold until competition is a reality, not a dream.^{17/}

III. THE COMMISSION'S GOALS ARE BEST ACHIEVED BY THE DEVELOPMENT OF PRO-COMPETITIVE POLICIES THAT BENEFIT ALL COMPETITORS.

The Commission acknowledges that "[c]ompetition is the surest means of achieving the consumer benefits we seek to promote."^{18/} Consequently, the Commission's focus should be devoted to resolving those issues vital to the success of all competitors. It does not promote competition, nor does it bring lower prices to consumers, to focus on policies that create

^{16/} (...continued)
fundamentally skew pricing signals and encourage inefficient infrastructure investment, the LECs should seek permission to raise those particular rates. It is unlikely that most LECs, in an era of rapidly declining telecom costs, could justify rate increases on the existing network; any state rate case would reveal residential rates that are far higher under incentive regulation than they would be if the LECs were called upon to prove their need for rate increases. It is more likely that LEC cries about "inefficient" competitor infrastructure investment are nothing more than rewarmed versions of AT&T's unfounded arguments made at the time interexchange competition began to appear as a serious possibility.

^{17/} For this reason Cox opposes the Notice's proposal to commence deregulation without regard to the actual competition faced by LECs.

^{18/} Second Further Notice at 5.

additional flexibility for incumbent LECs that continue to control bottleneck monopolies at the time when there is an unrealized hope for the development of facilities-based competition.

In particular, the Commission must establish immediately a comprehensive interconnection rule of mutual compensation and nondiscriminatory charges such as the "bill and keep" proposal advocated by Cox.^{19/} The Commission also must establish true number portability before any real test of local exchange competition can begin. Only after the necessary regulatory support structure for local exchange competition is in place and meaningful competition begins to emerge should the Commission begin to determine what further regulatory relief is warranted for incumbent LECs. After all, the LECs have already been given the incentive of price regulation over cost-of-service. Indeed, because the marketplace for local exchange service is far from competitive, the "competitive checklist"^{20/} proposed in the Second Further Notice could prove to be a self defeating prophecy if a LEC never faces actual local exchange competition.^{21/} Relief must be based on demonstrable, sustainable facilities-based competition, competition that is actually being offered, not on the possibility of competition.

There is absolutely nothing in the record to lead the Commission to a conclusion that the marketplace for local exchange service is competitive. Until the Commission puts into place the

^{19/} See Gerald W. Brock, Incremental Cost of Local Usage, filed on behalf of Cox Enterprises, Inc. in CC Docket No. 94-54 (filed March 16, 1995).

^{20/} Second Further Notice at 49-50.

^{21/} As the Notice states, the checklist reflects current legislative proposals of an administrative checklist to evaluate whether it is appropriate for a Bell Operating Company ("BOC") to provide interLATA long distance service. This checklist is by no means an appropriate one to use for the evaluation of an entirely different situation -- whether the LEC local monopoly bottleneck has dissipated. For this reason, any checklist formulated in a later proceeding would need considerable revision to become a template for LEC local services deregulation.

pro-competitive rules and policies necessary for local facilities-based competition to occur, evaluating further LEC deregulation simply puts the deregulatory cart before the competitive horse. Even initiating such a program could breed anticompetitive results. By unleashing LEC pricing flexibility that could be used to manipulate competitors' rates, the Commission will enhance the capacity of incumbent LECs to squash the possibility of widespread competition. The LECs could well be placed in a position of "managing" the development of their competition, while at the same time benefitting from the deregulation the Commission proposes to extend.

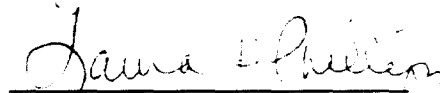
Four goals are enumerated in the Second Further Notice: "(1) encouraging market-based prices that reflect the cost of service; (2) encouraging efficient investment and innovation; (3) encouraging competitive entry in the interstate access and related local exchange markets; and (4) permitting [the Commission] to regulate noncompetitive markets in the most efficient and least intrusive way."^{22/} None of these goals would be advanced if the Notice's proposals were adopted. In fact, LEC price cap deregulation would have exactly the opposite effect: prices would remain artificially high because of LEC monopoly control; competitive investment would be discouraged; the prospect of facilities-based competitive entry in the interstate access and related local exchange market would be diminished; and the Commission could not efficiently regulate. The Commission should not deregulate the LECs when critically necessary pro-competitive policies in areas such as intercarrier interconnection and number portability have yet to be established.

^{22/} Second Further Notice at 4.

As it has in the long distance industry context, the Commission should consider LEC deregulation only after actual competition has been established and has taken root. Consequently, the Commission should put the ideas in the Second Further Notice on hold, work through the necessary steps to establish local exchange competition and then allow that competition to gain a firm foothold before it revisits the proposals contained in the Second Further Notice. Further dismantling LEC regulation prior to establishing reasonable ground rules for local competition plainly does not advance the Commission's avowed interests in competition or the public interest.

Respectfully submitted,

COX ENTERPRISES, INC.

A handwritten signature in cursive script, appearing to read "Laura H. Phillips", is written over a horizontal line.

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December 11, 1995

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Comments of Cox Enterprises, Inc." was served by hand on this 11th day of December, 1995, to the following:

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